

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM HANCOCK,)	CASE NO. C05-1494-JLR-MAT
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
JO ANNE B. BARNHART, Commissioner)	DISABILITY APPEAL
of Social Security)	
)	
Defendant.)	
_____)	

Plaintiff William D. Hancock proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) benefits and for Supplemental Security Income (SSI) payments after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that the case be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1950.¹ He has a limited 10th grade education. Plaintiff previously worked as a self-employed owner operator of a janitorial service, as a janitor, and as a forklift operator.

Plaintiff filed concurrent applications for DI and SSI in May 2003, alleging disability beginning January 1, 2001. His alleged disabling conditions included depression, anxiety, and panic attacks. (*See* AR 92.) Plaintiff's applications were denied initially and on reconsideration, and he timely requested a hearing.

ALJ Charlie Paul Andrus held a hearing on January 30, 2004. (AR 242-64.) The ALJ heard testimony from plaintiff and vocational expert Dennis Conroy. On June 23, 2004, ALJ Andrus issued a decision finding plaintiff not entitled to a period of disability, DI benefits, and not eligible for SSI payments (AR 16-23.)

Plaintiff appealed the ALJ's decision to the Appeals Council, which declined to review plaintiff's claim. (AR 4-6.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
02 be determined whether the claimant is gainfully employed. The ALJ found that after the date of
03 alleged onset of disability, plaintiff worked approximately eight to ten hours a week. Accordingly,
04 the ALJ found plaintiff had not engaged in substantial gainful activity during the relevant time
05 period. At step two, it must be determined whether a claimant suffers from a severe impairment.
06 The ALJ found plaintiff's depression, anxiety, post traumatic stress disorder, and back pain to be
07 severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The
08 ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairments.
09 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
10 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an
11 inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found him capable
12 of performing his past relevant work as a janitor. If a claimant demonstrates an inability to
13 perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that
14 the claimant retains the capacity to make an adjustment to work that exists in significant levels in
15 the national economy. Because the ALJ found plaintiff able to perform his past relevant work at
16 step four, he did not proceed to step five.

17 This Court's review of the ALJ's decision is limited to whether the decision is in
18 accordance with the law and the findings supported by substantial evidence in the record as a
19 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir.1993). Substantial evidence means more
20 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
21 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
22 (9th Cir.1989). If there is more than one rational interpretation, one of which supports the ALJ's

01 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
02 2002).

03 In this case, plaintiff asserts that the ALJ erred by not finding his personality disorder to
04 be a severe impairment, and by failing to consider the limitations opined by his examining and
05 treating psychiatrists and the DDS psychological/psychiatric consultants. He also alleges error in
06 the ALJ's finding that he had the RFC to perform light work, and in finding him capable of
07 returning to his past relevant work as a janitor. He argues the ALJ erred further in his hypothetical
08 to the vocational expert. Plaintiff asks for an award of benefits or, alternatively, remand for
09 further proceedings with both a medical examiner and vocational expert present to testify. The
10 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be
11 affirmed.

12 Personality Disorder, Not Otherwise Specified (NOS)

13 At step two, plaintiff must make a threshold showing that his medically determinable
14 impairments significantly limit his ability to perform basic work activities. *See Bowen v. Yuckert*,
15 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c). "Basic work activities" refers to "the
16 abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.921(b). "An impairment or
17 combination of impairments can be found 'not severe' only if the evidence establishes a slight
18 abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen*
19 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28).
20 "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." (Id.)
21 (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect"
22 of an individual's impairments in considering severity. (Id.)

01 In the present case, Dr. Lopez, plaintiff's treating psychiatrist, gave him a diagnosis of
02 personality disorder, not otherwise specified (AR 177), and Mr. Mills, the community mental
03 health nurse who saw plaintiff weekly under Dr. Lopez's supervision, reiterated that diagnosis.
04 (AR 239.) Conversely, neither Dr. Noia, nor Dr. Shapiro, the consulting psychologists, gave
05 plaintiff a personality disorder diagnosis. Dr. Geiseken, the state agency reviewing physician,
06 diagnosed a personality disorder; however, Dr. Nobel, the agency psychologist, did not. (AR 207,
07 170.)

08 Plaintiff asserts error in the ALJ's failure to find his diagnosed personality disorder a severe
09 impairment, claiming the ALJ rejected significant probative evidence without explanation. He
10 asserts the ALJ completely ignored this diagnosis made by Dr. Lopez and acknowledged by Dr.
11 Geiseken and Mr. Mills. The Commissioner counters that if the ALJ's omission of the personality
12 disorder diagnosis was error, it was harmless in that all of plaintiff's substantiated complaints and
13 limitations were adequately addressed by the ALJ. In particular, in the context of the Listing of
14 Impairments in Appendix 1 of 20 C.F.R. pt. 404, subpt. P, the ALJ assessed plaintiff's mental
15 impairments in detail under listings 12.04 (affective disorders) and 12.06 (anxiety disorders),
16 considered both the medical record and plaintiff's testimony, and found plaintiff to have severe
17 impairments. (AR 18-20.)

18 Pursuant to 20 C.F.R. §§ 404.1520a and 416.920a, as part of the special technique
19 required in evaluating mental impairments, the ALJ must rate the degree of functional limitation
20 resulting from the impairments. These impairment-related functional limitations are known as the
21 "B" criteria set out by the regulations for each listing of mental disorders. Functional limitations
22 can be rated using a Psychiatric Review Technique Form (PRTF), outlining the necessary steps

01 to rate the limitations in four identified broad functional areas: activities of daily living; social
02 functioning; concentration, persistence, or pace; and episodes of decompensation. *Id.* at §§
03 404.1520a(c)(3) and 416.920a(c)(3). Here, Dr. Geiseken and Dr. Nobel each completed a PRTF,
04 rating the severity of plaintiff's functional limitations. (AR 200-13, 163-76.) While Dr. Nobel did
05 not indicate the listed disorders under which he was rating plaintiff's functional limitations, it can
06 be inferred he was rating only under 12.04 (affective disorders) in light of other indications on the
07 form. (See AR 173, 163). Dr. Geiseken, on the other hand, specifies that his rating of plaintiff's
08 functional limitations was under 12.04 (affective disorders), 12.06 (anxiety-related disorders),
09 12.08 (personality disorders), and 12.09 (substance addiction disorders). (AR 210, 200.)

10 The ALJ in the present case specifies that the "B" criteria is the same for listings 12.04 and
11 12.06 in making his analysis, yet makes no mention of listing 12.08 (personality disorders).
12 Although finding plaintiff "only partially credible[.]" (AR 21), the ALJ rates plaintiff as more
13 functionally limited than does Dr. Geiseken or Dr. Nobel based on his testimony.² The ALJ
14 analyzes the "C" criteria for listing 12.04 and 12.06 separately, again making no mention of 12.08.
15 (AR 20.) Consistent with both PRTFs (AR 211, 174), the ALJ finds no presence of the "C"
16 criteria, basing his finding on the records of Dr. Lopez and Dr. Shapiro. (AR 20.)

17 In making his step three conclusion, the ALJ states he considered plaintiff's impairments
18 alone or in combination, yet makes no reference to the personality disorder diagnosis being part
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20 ² Both Dr. Geiseken and Dr. Nobel rate plaintiff's limitation "mild" for the first three areas,
21 and indicate "none" and "insufficient evidence" respectively for the fourth area; i.e., "repeated
22 episodes of deterioration." (AR 210, 173.) The ALJ, basing his findings on plaintiff's testimony
and Dr. Geiseken's report, finds plaintiff's limitations as "moderate" for the first two areas, "mild"
for the third, and "no indication" for the fourth. (AR 19.)

01 of that combination. (*Id.*) There is also no indication that the personality disorder diagnosis was
02 considered less significant than the 12.04 and 12.06 diagnoses, and was consequently subsumed
03 within the ALJ's finding. The ALJ erred by ignoring the personality disorder diagnosis given that:
04 (1) it was made by plaintiff's treating physician; (2) while not noted by psychologists Drs. Noia,
05 Shapiro or Nobel, it was corroborated by Dr. Geiseken; and (3) the ALJ gave no findings setting
06 forth specific, legitimate reasons for omitting the diagnosis based on substantial evidence in the
07 record.³ Personality disorder is not merely another descriptive label for plaintiff's mental
08 condition; it is a discrete diagnosis the ALJ ignored.

09 Physicians' and Psychologists' Opinions

10 In general, more weight should be given to the opinion of a treating physician than to a
11 non-treating physician, and more weight to the opinion of an examining physician than to a non-
12 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). *See also Smolen v.*
13 *Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996) (the opinions of specialists related to their areas of
14 specialization are given more weight than the opinions of non-specialists). Where not contradicted
15 by another physician, a treating or examining physician's opinion may be rejected only for "clear
16 and convincing" reasons. *Lester*, 81 F.3d at 830. (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
17 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not
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19 ³ The cursory nature of the ALJ's analysis is further exemplified by his finding two of
20 plaintiff's conditions severe based on purportedly discounted evidence. One was finding plaintiff's
21 back pain to be severe despite the lack of evidence in the medical record. (*see, e.g.*, AR 142, 156,
22 192, indicating no medical conditions) and based on plaintiff's testimony found by the ALJ to be
"only partially credible" (AR 21). The other was finding plaintiff's post traumatic stress disorder
(PTSD) to be severe despite the only mention in the medical record being made by Mr. Mills,
whose opinions the ALJ had rejected. (*See* AR 238-39, 21.)

01 be rejected without “‘specific and legitimate reasons’ supported by substantial evidence in the
02 record for so doing.” (Id.) at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
03 1983)). Where the opinion of the treating physician is contradicted, and the non-treating
04 physician’s opinion is based on independent clinical findings that differ from those of the treating
05 physician, the opinion of the non-treating physician may itself constitute substantial evidence. See
06 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to
07 resolve this conflict. *Id.*

08 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
09 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*,
10 81 F.3d at 830-34 (finding that, if doctors’ opinions and plaintiff’s testimony were credited as true,
11 plaintiff’s condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.
12 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,
13 the evidence supports a finding of disability. See, e.g., *Schneider v. Commissioner of Social Sec.*
14 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) (“When the lay evidence that the ALJ rejected is given
15 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff’s]
16 functional limitations is sufficient to meet or equal [a listing.]”); *Smolen*, 80 F.3d at 1292 (ALJ’s
17 reasoning for rejecting subjective symptom testimony, physicians’ opinions, and lay testimony
18 legally insufficient; finding record fully developed and disability finding clearly required).

19 However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*
20 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
21 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated
22 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon

an undeserving, able claimant.” *Barbato v. Commissioner of SSA*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician’s opinion were legally insufficient).

1. Dr. Lopez:

Plaintiff asserts that the ALJ, in addition to the alleged error regarding his personality disorder, also erred in failing to reflect Dr. Lopez’s findings regarding his abilities involving the complexity of job instructions, behaving in an emotionally stable manner, relating predictably in social situations, demonstrating reliability, or dealing with supervisors. (AR 178-79.) In particular, plaintiff asserts that Dr. Lopez’s treatment notes support the conclusion that he was seriously limited in his ability to interact with supervisors, and had previously experienced problems with bosses. (*See, e.g.*, AR 143.) In addition, plaintiff alleges the ALJ erred by ignoring or overlooking Dr. Lopez’s statement that he had discontinued medication because of the side effects.

Dr. Lopez, plaintiff’s treating psychiatrist, gave him three diagnoses: major depressive disorder, recurrent, moderate; social phobia; and personality disorder, NOS. (AR 177.) In a medical assessment, Dr. Lopez checked “fair” for plaintiff’s ability to understand, remember and carry out complex job instructions; checked the line between “fair” and “good” for detailed, but not complex job instructions; and checked “good” for simple job instructions. (AR 179.) The ALJ mentioned these various limitations in discussing plaintiff’s impairments under listings 12.04 and 12.06. (AR 18-20.) Similarly, in rating plaintiff’s ability to make personal/social adjustments on the same form, Dr. Lopez checked various spots in the “fair” category for plaintiff’s ability to behave in an emotionally stable manner, relate predictably in social situations, and to demonstrate

01 reliability. (AR 179.) Although the ALJ did not specifically mention these three findings, these
02 particular categories might be assumed to be subsumed into other categories.

03 Dr. Lopez also rated plaintiff as having “poor” ability in interacting with supervisors. (AR
04 29.) While the ALJ acknowledged plaintiff’s difficulty being in crowds and dealing with strangers
05 (AR 178), there was no reference to his limitation in interacting with supervisors. (*Id.*) Contrary
06 to the Commissioner’s argument that an inference can be drawn that the ALJ did not accept that
07 part of Dr. Lopez’s opinion in light of the lack of other medical opinion in the record, the ALJ
08 erred in this omission. However, plaintiff did not successfully make the case for crediting the
09 opinion of Dr. Lopez as true on this issue. Dr. Lopez’s treatment notes do not support a
10 conclusion that plaintiff was seriously limited in his ability to deal with supervision. *See, e.g.*, AR
11 143, 225-26, 228-29, 234-35 (reflecting reports of anger generally and one report that he did not
12 respect bosses who did not respect him). Also, Dr. Lopez’s opinion of plaintiff’s ability to
13 interact with supervisors is not supported by the opinions of Dr. Shapiro and Dr. Noia that he was
14 able to interact appropriately with others. (AR 158, 194.) Plaintiff’s ability to interact with
15 supervisors needs to be addressed on remand.⁴

16 Plaintiff is correct that the ALJ ignored the medication side effect issue. Treatment records
17 of Dr. Lopez and Mr. Mills reflect ongoing interactions with plaintiff regarding Effexor and
18 Lexapro. (*See* AR 218-38.) Progress notes reveal the clinicians repeatedly educating plaintiff
19 concerning the benefits of medications. (*Id.*) For his part, plaintiff generally resisted medication,
20 with complaints of side effects including impotence, nausea and feeling “wired,” headaches and

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22 ⁴ It should also be noted that the ALJ misstated Dr. Lopez’s rating of plaintiff’s ability to
deal with work stress as being “fair,” when in fact Dr. Lopez rated it as “poor.” (AR 18, 178.)

01 lack of appetite. (AR 218-20, 229.) However, the focus of plaintiff's allegation of error is unclear
02 given the absence of a finding by the ALJ reflecting negatively on plaintiff's lack of compliance
03 with doctors' orders regarding medication. And, significantly, at the time of the hearing, plaintiff
04 stated he was taking BuSpar for his depression. (AR 247-48.) In sum, any error in this regard
05 was harmless.

06 2. Dr. Noia:

07 Dr. Noia, a psychologist who performed a psychological examination on plaintiff as a
08 consultation, diagnosed him with depressive disorder, NOS. (AR 158.) Plaintiff alleges the ALJ
09 failed to incorporate three of Dr. Noia's assessments into his findings: the capability of following,
10 understanding and remembering simple instructions/directions and performing simple and some
11 complex tasks; the capability of maintaining attention and concentration, attending a routine and
12 maintaining a schedule but not on a consistent basis; and the prognosis of "fair." (*Id.*)

13 The ALJ relied on Dr. Noia's report in finding plaintiff severely impaired as the result of
14 depression and anxiety, stating that Dr. Noia's opinion was entitled to more weight than that of
15 the nurse, Mr. Mills. (AR 18, 21.) Although his opinion was not further cited by the ALJ, Dr.
16 Noia's findings that plaintiff's prognosis was "fair" and his capabilities regarding following
17 instructions and performing tasks were incorporated into the ALJ's decision, particularly into the
18 finding that plaintiff is "limited to the performance of routine, repetitive tasks[.]" (AR 22.)
19 However, the ALJ did not address Dr. Noia's finding concerning plaintiff's inability to maintain
20 attention and concentration for tasks, to attend to a routine and maintain a schedule on a
21 consistent basis. As reflected below, this failure to address the consistency issue is error on the
22 ALJ's part, and this issue should be addressed on remand rather than crediting the testimony of

01 Dr. Noia. Dr. Noia's opinion should be considered along with the opinion of Dr. Shapiro that
02 plaintiff's difficulty in attending to a routine and maintaining a schedule was due to a lack of
03 motivation and lethargy, particularly in the absence of opinion from other doctors on the issue of
04 consistency. (AR 194.)

05 3. Drs. Geiseken and Nobel:

06 Physician Geiseken and psychologist Nobel reviewed plaintiff's records on behalf of DDS,
07 each performing a Mental Residual Functional Capacity Assessment (MRFA) and completing a
08 PRTF. (AR 196-213, 159-76.) The two reviewers reached the same conclusions regarding
09 plaintiff in the check-box section on the MRFA, checking the "not significantly limited" box in all
10 categories with one exception, that being the "moderately limited" box for plaintiff's "ability to
11 carry out detailed instructions." (AR 196-97, 159-60.) In the narrative section of that form, Dr.
12 Geiseken states plaintiff "retains capacity for past relevant work as a janitor" (AR 198), and Dr.
13 Nobel states plaintiff "retains capacity for mental demands of work." (AR 161.) As stated above,
14 the ALJ relied on the PRTFs completed by Drs. Geiseken and Nobel in making his findings
15 regarding plaintiff's functional limitations. (AR 200-13, 163-76.)

16 Plaintiff asserts that the ALJ erred in failing to incorporate the assessments of Drs.
17 Geiseken and Nobel that he was moderately limited in his ability to carry out detailed instructions.
18 Having found plaintiff limited to the performance of routine, repetitive tasks, the ALJ was not
19 required to assess his ability to carry out detailed instructions in his RFC.

20 Residual Functional Capacity

21 The ALJ determined that plaintiff had the RFC to "perform the physical requirements of
22 a full range of heavy work ... but is limited to the performance of routine, repetitive tasks that do

01 not involve high levels of stress or involve significant interaction with members of the general
02 public[.]” (AR 22.) Plaintiff argues that the ALJ erroneously determined his RFC by failing to
03 properly consider the limitations opined by his examining and treating psychiatrist and by the DDS
04 psychological and psychiatric consultant.

05 The record in this case contains substantial evidence supporting the ALJ’s RFC
06 assessment. However, the ALJ’s analysis was nonetheless cursory as reflected by: (1) the
07 omission of Dr. Lopez’s diagnosis of personality disorder; (2) the failure to address the
08 consistency issue in Dr. Noia’s opinion; and (3) the absence of consideration of Dr. Lopez’s rating
09 as to plaintiff’s ability to interact with supervisors. As the RFC is implicated by these issues, it
10 should be reassessed on remand.

11 Past Relevant Work

12 In finding plaintiff has the capacity to perform his past work, the ALJ stated “as a janitor,”
13 as opposed to “as the self-employed owner operator of a janitorial service.” (AR 21.) The ALJ
14 relied on the vocational expert in making this finding, and specified “as performed by the claimant
15 and as that job is generally performed in the national economy,” requiring medium exertion but
16 not “significant interaction with the general public.” (AR 21-22)

17 Plaintiff asserts error at step four, arguing that the ALJ’s determination that he could
18 perform his past relevant work as a janitor was based on an erroneous RFC finding. Additionally,
19 plaintiff alleges error for not making findings of fact regarding the specific physical and mental
20 requirements of his past relevant work as a janitor, either as he performed it or as performed in
21 the national economy. However, the vocational expert stated that plaintiff’s past relevant work
22 as an owner of a janitorial business was a skilled, medium exertional level job. (AR 258.)

01 Plaintiff bases his argument that he cannot perform his past relevant work on his adoption
02 of the Dictionary of Occupational Titles (DOT) description of “Janitor” as found in 382.664-101.
03 The Commissioner points out that the DOT lists maximum requirements of occupations as
04 generally performed, not a range of requirements of a particular job as it is performed in a specific
05 setting, and that a vocational expert may provide more specific information about jobs than the
06 DOT. *See* SSR 00-4p, at *3. The requirements listed under DOT 382.664-101 include: the ability
07 to apply commonsense understanding to written, oral, or diagrammatic instructions (level 3
08 reasoning); the ability to add, subtract, multiply and divide, including fractions, and to compute
09 ratio, rate, and percent (level 2 math); the ability to write reports/essays with proper format,
10 punctuation, spelling, and grammar; the ability to speak before an audience with poise, voice
11 control, and confidence; and vocational preparation between one and three months (level 3
12 Specific Vocational Preparation (SVP)). Even when considered as a maximum, these
13 requirements seem to far exceed the demands of plaintiff’s prior relevant work as a janitor. Also,
14 given that the ALJ acknowledged plaintiff to be limited to tasks not involving “significant
15 interaction with members of the general public” (AR 22), this category appears additionally
16 inappropriate. Many of the possible job functions described under DOT 382.664-101 involve
17 apparently intense interaction with the public (e.g., “caution tenants regarding complaints about
18 excessive noise, disorderly conduct, or misuse of property”; “show empty apartments to
19 prospective tenants.”).

20 Plaintiff argues unconvincingly that DOT 382.664-101 is consistent with his self report
21 contained in his Work History Report. (AR 115.) That form covered the period from 1991 to
22 2003, with plaintiff describing his occupation as a “cleaner,” making no distinction between his

01 work as a janitor and his work as a janitorial business owner/operator. (AR 112.) Plaintiff listed
02 only cleaning functions (“vacuum cleaner, rug shampooer, strip and wax, stain removal”) with the
03 exception of two functions apparently performed in conjunction with owning/operating a janitor
04 business (“invoices”; supervising 2-3 people). (*Id.*) Moreover, plaintiff ignored other DOT
05 categories which more closely comport with his past work as a janitor. *See, e.g.*, DOT 381.687-
06 014 (“Cleaner, Commercial or Institutional”); DOT 381.687-018 (“Cleaner, Industrial”) (both
07 categories having “janitor” as alternate job title).

08 In sum, plaintiff failed to carry his burden of showing that he can no longer perform his
09 past relevant work. *See* 20 C.F.R. §§ 404.112(a), 404.1520(f), 416.920(f); *Barnhart v. Thomas*,
10 540 U.S. 20, 25 (2003), (“unless [claimant] shows that he cannot [perform past relevant work],
11 he is determined not to be disabled”); *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).
12 However, to the extent his RFC finding is implicated on remand, the ALJ should reassess
13 plaintiff’s ability to perform his past relevant work. In addition, because the ALJ specifies that
14 plaintiff’s past relevant work means working as a janitor as opposed to operating a janitorial
15 business, such work presumably requires interacting with supervisors. Therefore, the ALJ must
16 discuss the opinion given by the vocational expert concerning preclusion of work because of
17 limitations in dealing with supervisors. (AR 260-61.)

18 Hypothetical to Vocational Expert

19 A hypothetical posed to a vocational expert must include all of the claimant’s functional
20 limitations supported by the record. *Thomas v. Barnhart*, 278 F.3d at 956 (citing *Flores v.*
21 *Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A vocational expert’s testimony based on an
22 incomplete hypothetical lacks evidentiary value to support a finding that a claimant can perform

01 jobs in the national economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing
02 *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)). Plaintiff argues that the ALJ erred in
03 the hypothetical posed to the vocational expert in that it was based upon an erroneous RFC
04 assessment and did not include all of his limitations, resulting in incompetent testimony that
05 plaintiff could return to his past work. Plaintiff further asserts that when limitations found in Dr.
06 Noia's opinion were injected into the hypothetical to the vocational expert, there were no jobs
07 identified that he could perform.

08 The ALJ's examination of the vocational expert in this case began with questions about
09 plaintiff's past work, assuming limitations to simple routine work without high stress or significant
10 public contact. The expert responded that such a person could work as a janitor, but not as a
11 business owner running a business. (AR 258.)⁵ The ALJ then added limitations identified by Dr.
12 Lopez, namely those regarding plaintiff's abilities to deal with the public, to interact with
13 supervisors, and to deal with work stress. (AR 260, 178.) The expert's response was that "most
14 jobs would be eliminated The person would have to deal with a supervisor in a reasonable way,
15 and if there was [sic] serious limitations in that area, it would preclude a person being able to
16 maintain employment over a long period of time, unless special accommodations were made of
17 some kind." (AR 261.)

18 Next, the ALJ instructed the vocational expert to further assume that the hypothetical
19 person "may have some difficulty regularly attending to a routine and maintaining a schedule due
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22 ⁵ The vocational expert's answers stated that the job of janitor has an SVP of 2 or 3,
indicating his consideration of at least one DOT category in addition to 382.664-101.

01 to lethargy.” (AR 262.)⁶ The expert responded that even simple jobs require a routine, including
02 showing up for work regularly, “ ... and if the person was not able to do that, then any
03 employment would be a problem.” (*Id.*)

04 Following the ALJ’s inquiry, plaintiff’s counsel asked two questions, essentially adding the
05 limitation Dr. Noia imposed on plaintiff of not being able to maintain attention and concentration
06 for tasks or attend to a routine on a consistent basis. (AR 262-63, 158.) The vocational expert
07 responded that this inability would preclude the jobs he had mentioned. (AR 263.)

08 At each stage, the vocational expert’s opinion was implicated by the injection of additional
09 elements into the hypothetical, resulting in opinions inconsistent with the ALJ’s ultimately finding
10 plaintiff not disabled. As the vocational expert’s testimony stands in the record, the ALJ should
11 have found plaintiff disabled, and such a finding may not be supported by substantial evidence.
12 With the expansion of the hypothetical to include more and more restrictions, the ALJ should have
13 explained why he does or does not accept such limitations.

14 Specifically, those limitations include the vocational expert’s opinion that most jobs would
15 be precluded by limitations on a person’s ability to interact with supervisors (AR 260, 178.), the
16 opinion that “any employment would be a problem” for a person who “may have some difficulty
17 regularly attending to a routine and maintaining a schedule due to lethargy” (AR 262.), the opinion
18 that a lack of consistency in a person’s ability to maintain attention and concentration or attend
19 to a routine would preclude the mentioned jobs. Furthermore, if the vocational expert is relying
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21 ⁶This limitation was part of consulting psychologist Dr. Shapiro’s opinion of plaintiff, with
22 the exception that Dr. Shapiro stated “due to *lack of motivation* and lethargy. (AR 194.)
(emphasis added.)

01 on the job of janitor as it is generally performed rather than as plaintiff performed it, the ALJ
02 should query the expert as to which DOT classification he meant when he opined that plaintiff
03 could return to his past work as a janitor. (AR 258.)

04 Step Five

05 At hearing, the vocational expert in this case gave testimony regarding additional work in
06 the national economy plaintiff might perform, specifically the positions of kitchen helper and hand
07 packager. However, as acknowledged by the Commissioner, the ALJ made no finding at step five,
08 and was not required to do so, having found plaintiff capable of performing his past relevant work.
09 As with the RFC finding, a reassessment of the physicians' and psychologists' opinions may
10 implicate this decision. If, on remand, plaintiff is found not capable of performing his past relevant
11 work, the ALJ must make a finding at step five.

12 CONCLUSION

13 The ALJ's finding that plaintiff is not disabled is not supported by substantial evidence and,
14 therefore, should be REMANDED for further administrative proceedings.

15 DATED this 14th day of April, 2006.

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17 Mary Alice Theiler
18 United States Magistrate Judge
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